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MIGUEL ALVAREZ-MEZA

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

(HONORABLE JEFFREY T. MILLER)

UNITED STATES OF AMERICA, Plaintiff, v. MIGUEL ALVAREZ-MEZA, Defendant.	Case No. 08cr0246 JM **SUPPLEMENTAL BRIEF IN SUPPORT OF DEPORTATION MOTION**

I. MR. ALVAREZ-MEZA'S DUE PROCESS RIGHTS WERE VIOLATED DURING HIS 1996 DEPORTATION HEARING BECAUSE THE IJ FAILED TO OBTAIN A VALID WAIVER OF HIS RIGHT TO AN ATTORNEY

Although there is no Sixth Amendment right to counsel guaranteed at a deportation hearing, Congress has expressly recognized one, inherent within an individual's due process rights, which stem from the Fifth Amendment. *Ram v. Mukasey*, No. 05-71190, ___F.3d___, 2008 WL 2521887, slip op. 7569, 7575 (9th Cir. June 26, 2008) (citing *Tawadrus v. Ashcroft*, 364 F.3d 1099, 1103 (9th Cir. 2004).

At a minimum, during a deportation proceeding, the Immigration Judge ("IJ") must do the following three things: (1) inquire whether the person wants counsel; (2) determine a reasonable period of time for obtaining counsel; and (3) assess whether any waiver of counsel is knowing and voluntary. *Ram,* No. 05-71190, slip op. at 7575 (citing *Biwot v. Gonzales*, 403 F.3d 1094, 1100 (9th Cir. 2005). For a "'waiver [of counsel] to be valid, an IJ must generally: (1) inquire ***specifically*** as to whether petitioner wishes to continue without a lawyer; and (2) receive a knowing and voluntary affirmative response.'" *Ram*, No. 05-71190, slip op. at 7575 (citing *Tawardrus*, 364 F.3d at 1103) (emphasis added).

Here, the IJ failed to meet even one of the three elements required to obtain a valid waiver of counsel. First, not once during Mr. Alvarez-Meza's deportation hearing did the IJ ask him whether he wanted counsel present or whether he needed more time to obtain counsel. Second, the IJ did not determine a reasonable period of time for Mr. Alvarez-Meza to obtain counsel.[1/] Finally, the IJ obtained no waiver of counsel whatsoever and thus, failed to assess whether a waiver of counsel was knowing and voluntary. The IJ did not ***specifically*** address Mr. Alvarez-Meza and ask him whether he wanted to speak with an attorney before the hearing or whether he wanted an attorney present during the deportation proceedings. Finally, the deportation tape is devoid of any waiver, intelligent or otherwise, from Mr. Alvarez-Meza, of his right to counsel. Therefore, Mr. Alvarez-Meza's due process rights were violated and his failure to exhaust his administrative remedies is excused.

A. Prejudice

Because the NTA did not allege any convictions at all, and because judicially noticeable documents do not show that he ***was confined*** to a penal institution for 180 days, Mr. Alvarez-Meza was wrongfully denied voluntary departure.

[1/] During Mr. Alvarez-Meza's deportation hearing, the IJ told him he may be able to obtain papers because there was evidence that his father was either a legal permanent resident or a United States citizen. At this point, the IJ should have inquired whether Mr. Alvarez-Meza wanted an attorney present or needed more time to obtain legal advice. Instead, the IJ told Mr. Alvarez-Meza that he had two options: (1) he could go back to the bond hearing and try to obtain a bond or (2) he could take a deportation. Mr. Alvarez-Meza was never personally told he had a right to obtain counsel and thus, was deprived of due process.

To establish prejudice, we do not have to show that relief actually would have been granted. Instead, we only need to show a "plausible" ground for relief from deportation. *Ubaldo-Figueroa*, 364 F.3d at 1048, 1050 (citing *United States v. Arrieta*, 224 F.3d 1076, 1079 (9th Cir. 2000).

Here, Mr. Alvarez-Meza had a plausible ground for relief in the form of voluntary departure. *See* 8 U.S.C. § 1254(e) (1996) (a person may receive voluntary departure if he is a person of good moral character for a period of five years preceding his application for voluntary departure); *see also* 8 U.S.C. 1101(f)(7) (a person may be one of good moral character if he does is not confined to a penal institution for an aggregate period of 180 days).

Had Mr. Alvarez-Meza been apprised of his right to counsel, counsel would have noticed the defect in the conviction documents and helped Mr. Alvarez-Meza obtain relief in the form of a voluntary departure or adjustment of status based on Mr. Alvarez-Meza's father's papers. Since the IJ did not afford Mr. Alvarez-Meza his right to counsel, Mr. Alvarez-Meza's alleged 1996 deportation is invalid. *See Ram*, No. 05-71190 at 7578 (an undocumented person "cannot appear pro se without a knowing and voluntary waiver of the right to counsel").

II. CONCLUSION

For the foregoing reasons, Mr. Alvarez-Meza's prior alleged deportation in 1996 is invalid. Thus, the Court should dismiss the indictment.

Dated: *July 1, 2008*

s/*Kurt David Hermansen*

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Email: KDH@KurtDavidHermansen.com

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. MIGUEL ALVAREZ-MEZA, Defendant.	))))))))))	Case No. 08cr0246 JM CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED THAT:

I, KURT DAVID HERMANSEN, am a citizen of the United States and am at least eighteen years of age. My business address is 110 West C Street, Suite 1810, San Diego, California 92101.

I have caused service of **SUPPLEMENTAL BRIEF IN SUPPORT OF DEPORTATION MOTION**.

The following recipients are currently on the list to receive e-mail notices for this case and have thus been served electronically at the following email addresses:

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I declare under penalty of perjury that the foregoing is true and correct.

Executed on: *July 1, 2008*

s/*Kurt David Hermansen*
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